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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT RICHLAND

JAMES S. GORDON, JR., an individual residing in Benton County, Washington, Plaintiff, vs. IMPULSE MARKETING GROUP, INC., A Nevada Corporation, Defendant.	**No. CV-04-5125-FVS**
IMPULSE MARKETING GROUP, INC., Third-Party Plaintiff, vs. BONNIE GORDON, JAMES S. GORDON, III, JONATHAN GORDON, JAMILA GORDON, ROBERT PRITCHETT, and EMILY ABBEY, Third-Party Defendants.	**DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS AND MOTION TO STRIKE STATEMENT OF FACTS** DATE: October 14, 2005

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Motion to Strike Plaintiff's Statement of Facts

Defendant Impulse Marketing Group, Inc. ("Impulse" or "Defendant") hereby moves to strike the Rule 56.1 Statement of Facts (the "Statement") submitted by plaintiff James Gordon ("Plaintiff" or "Gordon") based upon: (1) the form and content of the Statement; and (2) Plaintiff's lack of standing to submit the Statement on behalf of third-party defendants Bonnie Gordon, James S. Gordon, III, Jonathan Gordon, Jamila Gordon, Robert Pritchett and Emily Abbey ("Third-Party Defendants").

Local Rule 56.1(a) provides, in pertinent part, that "any party filing a motion for summary judgment shall set forth separately from the memorandum of law, and in full, the specific facts relied upon in support of the motion. The specific facts shall be set forth in **serial fashion and not in narrative form**. (emphasis added). Plaintiff's Statement violates Local Rule 56.1(a) because the Statement: (1) fails to set forth Plaintiff's Facts in a serial fashion; (2) contains narrative and comment; and (3) includes inappropriate arguments and legal conclusions.

Pursuant to Rule 56, the purpose of Local Rule 56 is to "free district courts from the need to hunt through voluminous records without guidance from the

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parties," See e.g., Holtz v. Rockefeller & Co., 258 F.3d 62, 74 (2d Cir. 2001). Plaintiff has frustrated this purpose and wasted judicial economy by submitting a Statement that contains legal conclusions, hearsay, immaterial facts, argument and comment in violation of Local Rule 56.1(a).

As set forth more fully in our opposition to Plaintiff's Motion to dismiss Impulse's Amended Counterclaims and Third-Party Amended Complaint, Gordon lacks standing to submit the Statement on behalf of the Third-Party Defendants because: (1) Gordon does not have a personal stake in the outcome of the third-party action; (2) there is no direct relationship between the factual claims asserted against Gordon and those brought against Third-Party Defendants; (3) Gordon cannot bind Third-Party Defendants to his representations, admissions and positions; and (4) the interests of Gordon and Third-Party Defendants may vary.

In view of the foregoing, Defendant respectfully requests that this Court:

1. Strike the Statement in its entirety;
2. Award Defendant its attorneys' fees and costs associated with responding to Plaintiff's Statement; and
3. Grant such other and further relief as this Court deems appropriate.

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Counter-Statement of Facts

Notwithstanding the foregoing motion to strike Plaintiff's Statement in its entirety, Defendant hereby submits the following response to the Statement. Please be advised that Defendant did not correct any typographical errors contained in the Statement. Therefore, Defendant only responds to Plaintiff's Facts and not to any legal conclusions, hearsay, narrative, comment or argument contained in the Statement.

For purposes of streamlining Defendant's response to Plaintiff's Statement, please be advised that: (a) Defendant's Amended Answer ¶¶ 3.1-3.12.3 generally denies Plaintiff's Statement in its entirety or denies sufficient knowledge or information to respond to Plaintiff's allegations; (b) Plaintiff has refused to provided Defendant with any emails he allegedly received that he claims violate Washington law; and (c) there has been no discovery whatsoever in this lawsuit. Based on the foregoing, there are several questions of material fact that need to be resolved prior to the granting of summary judgment pursuant to Rule 56. Such questions include, but are not limited to:

- Whether or not Gordon, Third-Party Defendants, or anyone else allegedly received the commercial e-mail messages at issue;
- Whether or not Defendant transmitted the alleged emails at issue;

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- Whether or not the emails at issue violated Washington law;
- Whether Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing partners, with untruthful and inaccurate registration information; and
- Whether Gordon and/or Third-Party Defendants misrepresented their identities to Impulse and/or its marketing partners.

To prevail on a motion for summary judgment the evidence must reveal no genuine issue of material fact when viewed in the light most favorable to the party opposing summary judgment. S.D. Myers, Inc. v. City & County of San Francisco, 253 F.3d 461, 466 (9th Cir 2001). The court in S.D. Meyers, Inc., stated that the threshold inquiry is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." S.D. Meyers, Inc. at 466. In making this determination, a court must view the evidence in the light most favorable to the non-moving party. Eichacker v. Paul Revere Life Ins. Co., 354 F.3d 1142, 1145 (9th Cir. 2004).

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Plaintiff's Fact #1:

On or about May of 1998, Mr. Gordon registered the domain name "gordonworks.com" and began using it to make information relating to job searching and career development available to the general public on the internet. Mr. Gordon also began using the email address **gordonworks@gordonworks.com**. Gordon Declaration ¶ 2.

Response:

Based upon the lack of any discovery in this lawsuit, Defendant denies knowledge or information as to Plaintiff's Fact #1. Defendant's Amended Answer ¶¶ 3.1-3.4. Notwithstanding the foregoing, Plaintiff's Fact #1 is immaterial to Plaintiff's Motion for Summary judgment to dismiss Defendant's amended counterclaims and third-party amended complaint ("Plaintiff's Motion").

Plaintiff's Fact #2:

In addition to the email address "gordonworks@gordonworks.com" Mr. Gordon created numerous other email addresses, all using the gordonworks.com domain. These included msm@gordonworks.com, cash@gordonworks.com, goals@gordonworks.com, business@gordonworks.com, jobs@gordonworks.com, marketer@gordonworks.com, localbusiness@gordonworks.com, peace@gordonworks.com, postmaster@gordonworks.com, referral@gordonworks.com, webmaster@gordonworks.com, genesis@gordonworks.com, teen@gordonworks.com, telecom@gordonworks. Gordon Declaration, ¶ 4.

Response:

Based upon the lack of any discovery in this lawsuit, Defendant denies knowledge or information as to Plaintiff's Fact #2. Defendant's Amended Answer ¶¶ 3.1-3.4.

Plaintiff's Fact #3:

Many of these email addresses were published on the internet on various web pages Mr. Gordon created. Gordon Declaration, ¶ 5.

Response:

Based upon the lack of any discovery in this lawsuit, Defendant denies knowledge or information as to Plaintiff's Fact #3. Defendant's Amended Answer ¶¶ 3.1-3.4. Notwithstanding the foregoing, Plaintiff's Fact #3 is immaterial to Plaintiff's Motion.

Plaintiff's Fact #4:

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Almost as soon as each of these email addresses was published on the internet, Mr. Gordon began receiving commercial email at these addresses. Gordon Declaration, ¶ 5.

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Response:

Genuine issues of material fact exist regarding Plaintiff's Fact #4. Specifically, there are genuine issues of material fact as to: (a) whether Gordon, Third-Party Defendants, or anyone else allegedly received the commercial e-mail messages at issue; (b) whether or not Defendant transmitted the alleged emails at issue; (c) whether or not the emails at issue violated Washington law; (d) whether Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing partners, with untruthful and inaccurate registration information; and (e) whether Gordon and/or Third-Party Defendants misrepresented their identities to Impulse and/or its marketing partners. Defendant's Amended Answer ¶¶ 3.1-3.4. The Court is respectfully further referred to the Gordon Initial Disclosures in the Related Action (the "Gordon Initial Disclosures") attached to the Declaration of James Bodie, dated September 23, 2005 (the "Bodie Declaration"), of which this Court has taken judicial notice, that provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself, received commercial e-mail. (emphasis added). As the Gordon Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the disclosure, reasonable inquiry and evidentiary support, the contradictory representations in the Gordon Declaration and the Gordon Initial Disclosures raises

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triable issues of material fact in this third-party action and counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

Plaintiff's Fact #5:

The addresses for Mr. Gordon's family members, bonnie@gordonworks.com, jay@gordonworks.com, jamila@gordonworks.com, jonathan@gordonworks.com, jim@gordonworks.com, james@gordonworks.com, were all published on the internet on web pages Mr. Gordon built for his family. Gordon Declaration, ¶ 6.

Response:

Based upon the lack of any discovery in this lawsuit, Defendant denies knowledge or information as to Plaintiff's Fact #5.

Plaintiff's Fact #6:

Although the web pages are related to Mr. Gordon's family members, all of them were created and maintained by Mr. Gordon, and email sent to any of these email addresses is and was received by Mr. Gordon. Gordon Declaration, ¶ 7.

Response:

Genuine issues of material fact exist regarding Plaintiff's Fact #6. Specifically, there are genuine issues of material fact as to: (a) whether Gordon, Third-Party Defendants, or anyone else allegedly received the commercial e-mail

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messages at issue; (b) whether or not Defendant transmitted the alleged emails at issue; (c) whether or not the emails at issue violated Washington law; (d) whether Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing partners, with untruthful and inaccurate registration information; and (e) whether Gordon and/or Third-Party Defendants misrepresented their identities to Impulse and/or its marketing partners. Defendant's Amended Answer ¶¶ 3.1-3.4. Further, the Court is respectfully referred to the Gordon Initial Disclosures attached to Bodie Declaration, of which this Court has taken judicial notice, that provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself, received commercial e-mail allegedly at issue. (emphasis added). As the Gordon Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the disclosure, reasonable inquiry and evidentiary support, the contradictory representations in the Gordon Declaration and the Gordon Initial Disclosures raises triable issues of material fact in this third-party action and counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

Plaintiff's Fact #7:

In response to commercial emails purporting to offer free products, on or about September 1, 2003, Mr. Gordon requested to receive the free products advertised in these offers. Gordon Declaration, ¶¶ 8 & 9.

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Response:

Based upon the lack of any discovery in this lawsuit, Defendant denies knowledge or information as to Plaintiff's Fact #7.

Plaintiff's Fact #8:

These submissions were made by visiting a website advertised in these emails, and entering an email address and other information into an online form. Mr. Gordon used the following email addresses james@gordonworks.com, faye@gordonworks.com, jamila@gordonworks.com, jay@gordonworks.com, jonathan@gordonworks.com, emily@gordonworks.com Gordon Declaration, ¶ 9.

Response:

Based upon the lack of any discovery in this lawsuit as well as Plaintiff's refusal to provide Defendant's with the alleged violative emails, Defendant denies knowledge or information as to Plaintiff's Fact #8. Notwithstanding the foregoing, genuine issues of material fact exist regarding Plaintiff's Fact #8. Specifically, there are genuine issues of material fact as to: (a) whether Gordon, Third-Party Defendants, or anyone else allegedly received the commercial e-mail messages at issue; (b) whether or not Defendant transmitted the alleged emails at issue; (c) whether or not the emails at issue violated Washington law; (d) whether Gordon

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and/or Third-Party Defendants provided Impulse, and/or its marketing partners, with untruthful and inaccurate registration information; and (e) whether Gordon and/or Third-Party Defendants misrepresented their identities to Impulse and/or its marketing partners. Defendant's Amended Answer ¶¶ 3.1-3.4. Further, the Court is respectfully referred to the Gordon Initial Disclosures attached to Bodie Declaration, of which this Court has taken judicial notice, that provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself, received commercial e-mail allegedly at issue. (emphasis added). As the Gordon Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the disclosure, reasonable inquiry and evidentiary support, the contradictory representations in the Gordon Declaration and the Gordon Initial Disclosures raises triable issues of material fact in this third-party action and counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

Plaintiff's Fact #9:

Mr. Gordon never received any of the free products advertised in the emails.

Response:

Based upon the lack of any discovery in this lawsuit as well as Plaintiff's refusal to provide Defendant with the alleged violative emails, Defendant denies knowledge or information as to Plaintiff's Fact #9 and Plaintiff's Fact #9 is

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immaterial to Plaintiff's Motion. Further, there are genuine issues of material fact as to: (a) whether Gordon, Third-Party Defendants, or anyone else allegedly received the commercial e-mail messages at issue; (b) whether or not Defendant transmitted the alleged emails at issue; (c) whether or not the emails at issue violated Washington law; (d) whether Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing partners, with untruthful and inaccurate registration information; and (e) whether Gordon and/or Third-Party Defendants misrepresented their identities to Impulse and/or its marketing partners. Further, the Court is respectfully referred to the Gordon Initial Disclosures attached to Bodie Declaration, of which this Court has taken judicial notice, that provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself, received commercial e-mail allegedly at issue. (emphasis added). As the Gordon Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the disclosure, reasonable inquiry and evidentiary support, the contradictory representations in the Gordon Declaration and the Gordon Initial Disclosures raises triable issues of material fact in this third-party action and counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

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Plaintiff's Fact #10:

Nowhere on any of these websites was Mr. Gordon asked to give his consent to receive any commercial email from Defendant. Gordon Declaration ¶ 11.

Response:

Genuine issues of material fact exist regarding Plaintiff's Fact #10. Specifically, there are genuine issues of material fact as to: (a) whether Gordon, Third-Party Defendants, or anyone else allegedly received the commercial e-mail messages at issue; (b) whether or not Defendant transmitted the alleged emails at issue; (c) whether or not the emails at issue violated Washington law; (d) whether Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing partners, with untruthful and inaccurate registration information; and (e) whether Gordon and/or Third-Party Defendants misrepresented their identities to Impulse and/or its marketing partners.

Further, the Court is respectfully referred to the Gordon Initial Disclosures attached to Bodie Declaration, of which this Court has taken judicial notice, that provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself, received commercial e-mail allegedly at issue. (emphasis added). As the Gordon Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the

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disclosure, reasonable inquiry and evidentiary support, the contradictory representations in the Gordon Declaration and the Gordon Initial Disclosures raises triable issues of material fact in this third-party action and counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30. In support of Defendant's contention that a material issue of fact exists with respect to Plaintiff's Fact #10, this Court is respectfully referred to: (a) page 9, lines 17-19 of Plaintiff's Statement, wherein Plaintiff admits that Defendant's counterclaims and third-party claims contain allegations contrary to this fact; (b) Defendant's First Amended Counterclaim ¶¶ 1-15; (c) Defendant's Fourth Amended Counterclaim ¶ 33; (d) Defendant's Third-Party Complaint ¶¶ 8, 15-21 and 38; (e) Exhibit F of the Declaration of Phil Huston in support of Impulse's Motion to Dismiss Plaintiff's Complaint (the "Huston Declaration"); (f) ¶¶ 22 and 23 of the Huston Declaration; and (g) ¶ 48 of the Bodie Declaration.

Plaintiff's Fact #11:

At not time did Mr. Gordon give his consent to receive any commercial email from the Defendant. Gordon Declaration ¶ 11.

Response:

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Genuine issues of material fact exist regarding Plaintiff's Fact #11. Specifically, there are genuine issues of material fact as to: (a) whether Gordon, Third-Party Defendants, or anyone else allegedly received the commercial e-mail messages at issue; (b) whether or not Defendant transmitted the alleged emails at issue; (c) whether or not the emails at issue violated Washington law; (d) whether Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing partners, with untruthful and inaccurate registration information; and (e) whether Gordon and/or Third-Party Defendants misrepresented their identities to Impulse and/or its marketing partners.

Further, the Court is respectfully referred to the Gordon Initial Disclosures attached to Bodie Declaration, of which this Court has taken judicial notice, that provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself, received commercial e-mail. (emphasis added). As the Gordon Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the disclosure, reasonable inquiry and evidentiary support, the contradictory representations in the Gordon Declaration and the Gordon Initial Disclosures raises triable issues of material fact in this third-party action and counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

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In support of Defendant's contention that material issues of fact exist with respect to Plaintiff's Fact #11, this Court is respectfully referred to: (a) page 10, lines 10-14 of Plaintiff's Statement, wherein Plaintiff admits that Defendant has contested this fact at paragraph 48 of the Bodie Declaration; (b) Defendant's First Amended Counterclaim ¶¶ 1-15; (c) Defendant's Fourth Amended Counterclaim ¶ 33; (d) Defendant's Third-Party Complaint ¶¶ 8, 15-21 and 38; (e) Exhibit F to the Huston Declaration; (f) ¶¶ 22 and 23 of the Huston Declaration; and (g) ¶ 48 of the Bodie Declaration.

Plaintiff's Fact # 12:

Almost immediately after Mr. Gordon had filled out the online forms which purported to offer free products, Mr. Gordon began to receive a torrent of commercial email from the Defendant at the email addresses Mr. Gordon had used to try to accept the offers for free prizes. Gordon Declaration, ¶ 12.

Response:

Genuine issues of material fact exist regarding Plaintiff's Fact #12. Specifically, there are genuine issues of material fact as to: (a) whether Gordon, Third-Party Defendants, or anyone else allegedly received the commercial e-mail messages at issue; (b) whether or not Defendant transmitted the alleged emails at

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issue; (c) whether or not the emails at issue violated Washington law; (d) whether Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing partners, with untruthful and inaccurate registration information; and (e) whether Gordon and/or Third-Party Defendants misrepresented their identities to Impulse and/or its marketing partners. Further, the Court is respectfully referred to the Gordon Initial Disclosures attached to Bodie Declaration, of which this Court has taken judicial notice, that provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself, received commercial e-mail allegedly at issue. (emphasis added). Defendant's First Amended Counterclaim ¶¶ 1-15; Defendant's Fourth Amended Counterclaim ¶ 33; Defendant's Third-Party Complaint ¶¶ 8, 15-21 and 38. As the Gordon Initial Disclosures were subject to F.R.C.P. § 11 requiring, at the time of the disclosure, reasonable inquiry and evidentiary support, the contradictory representations in the Gordon Declaration and the Gordon Initial Disclosures raises triable issues of material fact in this third-party action and counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

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Plaintiff's Fact #13:

Within a few weeks of his requests for free products, Mr. Gordon attempted to stop the resulting torrent of commercial email by unsubscribing from these email lists. Gordon Declaration, ¶ 13.

Response:

A genuine issue of material fact exists regarding Plaintiff's Fact #13. Specifically, there is a genuine issue of material fact as to if and when Gordon and/or his family member's "opted-in" again after such "opt-out" occurred. Bodie Declaration ¶ 35.

Plaintiff's Fact #14:

In October of 2003, Mr. Gordon began submitting "unsubscribe" requests to the Defendants, and continued to do so through Spring of 2005. Gordon Declaration, ¶ 14.

Response:

Based upon the lack of any discovery in this lawsuit, Defendant denies knowledge or information as to Plaintiff's Fact #14. Further genuine questions of material fact exist regarding Plaintiff's Fact #14. Specifically, there are genuine issues of material fact as to: (a) whether Gordon, Third-Party Defendants, or anyone

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else submitted "unsubscribe" requests to anyone, let alone the Defendant; (b) whether Gordon, Third-party Defendants, or anyone else allegedly received the commercial e-mail messages at issue; (c) whether or not Defendant transmitted the alleged emails at issue; (d) whether or not the emails at issue violated Washington law; (e) whether Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing partners, with untruthful and inaccurate registration information; and (f) whether Gordon and/or Third-Party Defendants misrepresented their identities to Impulse and/or its marketing partners. Defendant's First Amended Counterclaim ¶¶ 1-15; Defendant's Fourth Amended Counterclaim ¶ 33; Defendant's Third-Party Complaint ¶¶ 8, 15-21 and 38; Huston Declaration, Exhibit "F."

Further, the Court is respectfully referred to the Gordon Initial Disclosures attached to Bodie Declaration, of which this Court has taken judicial notice, that provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself, received commercial e-mail allegedly at issue. (emphasis added). As the Gordon Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the disclosure, reasonable inquiry and evidentiary support, the contradictory representations in the Gordon Declaration and the Gordon Initial Disclosures raises triable issues of material fact in this third-party action and counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

Plaintiff's Fact #15:

Exhibit F of the Declaration of Phil Huston filed with the Court January 21, 2005, shows that the Plaintiff "opted out" of receiving future commercial emails from the Defendant on October 15, 2003.

Response:

A genuine issue of material fact exists regarding Plaintiff's Fact #15. Specifically, there is a genuine issue of material fact as to whether Plaintiff "opted out" of receiving future commercial emails from the Defendant on October 15, 2003. Contrary to Plaintiff's Fact #15, Exhibit "F" does not reflect that Gordon and/or his family members "opted-out" to receiving "all" e-mails. Rather, Exhibit "F" of the Huston Declaration supports the proposition that "some" of the e-mails had been requested to be stopped being transmitted. Bodie Declaration ¶¶ 32-35.

Plaintiff's Fact #16:

Mr. Gordon's "unsubscribe" requests were ignored, and in fact, the amount of emails Mr. Gordon received increased after these requests were sent.

Response:

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Specifically, there are genuine issues of material fact as to: (a) whether Gordon, Third-Party Defendants, or anyone else submitted "unsubscribe" requests to anyone, let alone the Defendant; (b) whether Gordon, Third-party Defendants, or anyone else allegedly received the commercial e-mail messages at issue; (c) whether or not Defendant transmitted the alleged emails at issue; (d) whether or not the emails at issue violated Washington law; (e) whether Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing partners, with untruthful and inaccurate registration information; and (f) whether Gordon and/or Third-Party Defendants misrepresented their identities to Impulse and/or its marketing partners. Defendant's First Amended Counterclaim ¶¶ 1-15; Defendant's Fourth Amended Counterclaim ¶ 33; Defendant's Third-Party Complaint ¶¶ 8, 15-21 and 38; Huston Declaration, Exhibit "F."

Further, the Court is respectfully referred to the Gordon Initial Disclosures attached to Bodie Declaration, of which this Court has taken judicial notice, that provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself, received commercial e-mail allegedly at issue. (emphasis added). As the Gordon Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the disclosure, reasonable inquiry and evidentiary support, the contradictory

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representations in the Gordon Declaration and the Gordon Initial Disclosures raises triable issues of material fact in this third-party action and counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30. Frankly, Defendant has no knowledge of what emails and unsubscribe requests Plaintiff refers to.

Plaintiff's Fact #17:

All of the emails that form the basis for Mr. Gordon's lawsuit against the Defendant were received by Mr. Gordon after Mr. Gordon had submitted these "unsubscribe" requests.

Response:

There are genuine issues of material fact as to: (a) whether Gordon, Third-Party Defendants, or anyone else submitted "unsubscribe" requests to anyone, let alone the Defendant; (b) whether Gordon, Third-party Defendants, or anyone else allegedly received the commercial e-mail messages at issue; (c) whether or not Defendant transmitted the alleged emails at issue; (d) whether or not the emails at issue violated Washington law; (e) whether Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing partners, with untruthful and inaccurate registration information; and (f) whether Gordon and/or Third-Party Defendants misrepresented their identities to Impulse and/or its marketing partners. Defendant's

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First Amended Counterclaim ¶¶ 1-15; Defendant's Fourth Amended Counterclaim ¶ 33; Defendant's Third-Party Complaint ¶¶ 8, 15-21 and 38; Huston Declaration, Exhibit "F."

Further, the Court is respectfully referred to the Gordon Initial Disclosures attached to Bodie Declaration, of which this Court has taken judicial notice, that provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself, received commercial e-mail allegedly at issue. (emphasis added). As the Gordon Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the disclosure, reasonable inquiry and evidentiary support, the contradictory representations in the Gordon Declaration and the Gordon Initial Disclosures raises triable issues of material fact in this third-party action and counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

Plaintiff's Fact #18:

Throughout the fall of 2003, Mr. Gordon continued to receive emails from the Defendant, and Mr. Gordon brought complaints about this unwanted and ongoing commercial email to the Federal Trade Commission, the Attorney General for Washington State, Tier 1 backbone internet providers, Mr. Gordon's local ISP, and the local, Richland, Washington police department. Gordon Declaration, ¶ 17.

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Response

Based upon the lack of any discovery in this lawsuit, Defendant denies knowledge or information as to whether Mr. Gordon brought complaints about unwanted and ongoing commercial email to the Federal Trade Commission, the Attorney General for Washington State, Tier 1 Backbone Internet Providers and the local, Richland, Washington police department

Further, any factual evidence that Mr. Gordon brought complaints about unwanted and ongoing commercial email to the Federal Trade Commission, the Attorney General for Washington State, Tier 1 Backbone Internet Providers and the local, Richland, Washington police department is: (a) hearsay; and (b) immaterial to Defendant's Amended Counterclaims and Third-Party Amended Complaint.

Notwithstanding the foregoing, there are genuine issues of material fact as to: (a) whether Gordon, Third-Party Defendants, or anyone else submitted "unsubscribe" requests to anyone, let alone the Defendant; (b) whether Gordon, Third-party Defendants, or anyone else allegedly received the commercial e-mail messages at issue; (c) whether or not Defendant transmitted the alleged emails at issue; (d) whether or not the emails at issue violated Washington law; (e) whether Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing partners, with untruthful and inaccurate registration information; and (f) whether Gordon and/or Third-Party Defendants misrepresented their identities to Impulse and/or its marketing partners. Defendant's First Amended Counterclaim ¶¶ 1-15; Defendant's Fourth Amended Counterclaim ¶ 33; Defendant's Third-Party Complaint ¶¶ 8, 15-21 and 38; Huston Declaration, Exhibit "F."

Further, the Court is respectfully referred to the Gordon Initial Disclosures attached to Bodie Declaration, of which this Court has taken judicial notice, that provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself, received commercial e-mail allegedly at issue. (emphasis added). As the Gordon Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the disclosure, reasonable inquiry and evidentiary support, the contradictory representations in the Gordon Declaration and the Gordon Initial Disclosures raises triable issues of material fact in this third-party action and counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30. Frankly, Defendant has no knowledge of what emails Plaintiff refers to.

Plaintiff's Fact #19:

At the local Richland, Washington police department, Mr. Gordon was put in contact with Officer Lew Reed, a police officer specializing in cybercrimes

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investigations. Officer Reed personally examined about 2,000 emails sent by the Defendant, and confirmed to Mr. Gordon that information in the transmission paths of the emails in question had been omitted and/or mischaracterized. Gordon Declaration, ¶ 18.

Response:

Based upon the lack of any discovery in this lawsuit as well as Plaintiff's refusal to provide us with the allegedly violative emails at issue, Defendant denies knowledge or information as to Plaintiff's Fact #19. Defendant further objects and moves to strike Plaintiff's Fact #19 on the ground that such a factual representation is immaterial, contains hearsay and is thus inadmissible.

Plaintiff's Fact #20:

In November of 2004, having confirmed that the emails in question violated RCW 19.190 et seq., and having exhausted all avenues Mr. Gordon could conceive of to stop the sending of this illegal spam to his domain short of litigation, Mr. Gordon brought this suit against the Defendant. Gordon Declaration, ¶ 19.

Response:

Based upon the lack of any discovery in this lawsuit and Plaintiff's refusal to provide Defendant with the alleged violative emails, Defendant denies knowledge

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or information as to Plaintiff's Fact #20 but does not contest that Mr. Gordon brought suit against the Defendant. Further, Defendant objects and moves to strike Plaintiff's Fact #20 on the grounds that such a factual representation violates Local Rule 56.1(a) because: (a) it is immaterial to Defendant's amended counterclaims and third-party amended complaint; and (b) it contains inappropriate legal conclusions, argument and comment.

Plaintiff's Fact #21:

Despite all of these efforts, and the fact that Mr. Gordon's lawsuit against the Defendant has been pending for 10 months, to this day the Defendant continues to send Mr. Gordon commercial email that violates RCW 19.190 et seq. Gordon Declaration ¶ 20.

Response:

Defendant objects and moves to strike Plaintiff's Fact #21 on the ground that such a statement is an opinion as well as an invalid statement and inappropriate legal conclusion pursuant to Local Rule 56.

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Plaintiff's Fact #22:

In his prior lawsuit against Commonwealth Marketing Group, Inc., Mr. Gordon identified his wife, Mrs. Bonnie Gordon; his children, Mr. James. S. Gordon III, Mr. Jonathan Gordon, and Ms. Jamila Gordon; his friends, Mr. Robert Pritchett, and Ms. Emily Abbey; and Officer Lew Reed as witnesses.

Response:

Defendant does not dispute that in his prior lawsuit against Commonwealth Marketing Group, Inc., Mr. Gordon identified his wife, Mrs. Bonnie Gordon; his children, Mr. James. S. Gordon III, Mr. Jonathan Gordon, and Ms. Jamila Gordon; his friends, Mr. Robert Pritchett, and Ms. Emily Abbey; and Officer Lew Reed as witnesses.

Plaintiff's Fact #23:

Defendant has now sued all of these individuals as "Third Party Defendants," although the Defendant has moved to dismiss Officer Lew Reed.

Response:

Defendant does not dispute that it has now sued all of these individuals as "Third Party Defendants" based upon: (a) their participation in a scheme to, *inter alia¸* defraud Defendant; and (b) their providing Defendant with inaccurate and

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untruthful information. Defendant has moved to dismiss Officer Lew Reed. Mr. Reed's dismissal was granted by this Court.

Plaintiff's Fact #23:[1]

To the extent that Mr. Gordon ever had any conversations with any of the Third Party Defendants related to commercial emails sent by the Defendant, Mr. Gordon expressed his desire that they stop sending these emails, and his frustration that the Defendant would not. Gordon Declaration, ¶24.

Response:

To the extent that the Defendant can make sense out of the awkward sentence structure contained in Plaintiff's Fact #23, Defendant objects and moves to strike Plaintiff's Fact #23 on the ground that such a factual representation is inadmissible as hearsay.

Plaintiff's Fact #24:

To the best of Mr. Gordon's knowledge, at no time have any of the Third Party Defendants ever solicited any of the commercial email to the "gordonworks.com" email addresses that form the basis of this lawsuit.

Response:

[1] Please be advised that Plaintiff has erroneously set forth two (2) factual statements that contain the heading "Plaintiff's Fact #23."

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A genuine issue of material fact exists regarding Plaintiff's Fact #24. Specifically, there is a genuine issue of material fact as to whether any of the Third Party Defendants ever solicited any of the commercial email to the "gordonworks.com" email addresses. In support of Defendant's contention that a material issue of fact exists with respect to Plaintiff's Fact #24, this Court is respectfully referred to: (a) page 16 of Plaintiff's Statement, wherein Plaintiff admits that Defendant's counterclaims and third-party claims contain allegations contrary to this fact; (b) Defendant's Third-Party Complaint ¶¶ 1, 2, 8, 11, 15-21, 31 and 44; and (c) ¶ 20 of the Bodie Declaration.

Plaintiff's Fact #25:

At no time did any of the Third Party Defendants and Mr. Gordon ever discuss any "scheme" whereby they would solicit any commercial emails to any "gordonworks.com" email address that forms the basis of this lawsuit, as such would have been directly contrary to Mr. Gordon's often stated desire that the Defendant stop sending me commercial email.

Gordon Declaration, ¶ 26.

Response:

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Defendant denies Plaintiff's Fact #25. First, Gordon lacks standing to submit the Statement on behalf of the Third-Party Defendants because: (1) Gordon does not have a personal stake in the outcome of the third-party action; (2) there is no direct relationship between the factual claims asserted against Gordon and those brought against Third-Party Defendants; (3) Gordon cannot bind Third-Party Defendants to his representations, admissions and positions; and (4) the interests of Gordon and Third-Party Defendants may vary. Bodie Declaration ¶¶ 3-5.

Second, Impulse alleges that: (a) Third Party Defendants assisted in the transmission of commercial electronic messages to the "gordonworks.com" domain (the "Domain") by actively and affirmatively soliciting commercial emails for the sole purpose of filing multiple lawsuits arising out of the receipt of these commercial email messages (the "Scheme"); (b) Third Party Defendants knew or consciously avoided knowing that by actively and affirmatively soliciting commercial emails for the sole purpose of filing multiple lawsuits arising out of the receipt of these commercial email messages that they would receive commercial email messages to the Domain; (c) Third Party Defendants provided substantial assistance or support that enabled the formulation, composition, origination, initiation, or transmission of commercial email messages to the Domain; (d) Third

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Party Defendants knew or consciously avoided knowing that they were participating in the Scheme; and (e) Third Party Defendants knew or consciously avoided knowing that Plaintiff was providing Third Party Plaintiff with inaccurate and untruthful registration information. Defendant's third-party amended complaint ¶¶ 1-5.

Plaintiff's Fact #26:

The Defendant's claims against the Third Party Defendants thus appear to be nothing more than an attempt to harm Mr. Gordon by exposing his friends, family and law enforcement witnesses to the costs of defending themselves in civil litigation. Gordon Declaration, ¶ 27.

Response:

Defendant objects and moves to strike Plaintiff's Fact #26 as containing inappropriate narrative, comment and hyperbole in violation of Local Rule 56.1(a).

Defendant's Fact #1:

The Defendant has alleged that "to the extent any emails referenced in Gordon's complaint are indirectly attributable to Impulse, said emails were transmitted by CMG." Bodie Declaration ¶ 7.

Response:

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Defendant maintains that the Bodie Declaration speaks for itself. ¶ 7 of the Bodie Declaration.

Dated: October 14, 2005

s/ Floyd E. Ivey
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I hereby certify that on October 14, 2005, I electronically filed **Defendant's Response to Plaintiff's Statement of Material Facts and Motion to Strike Statement of Facts** with the Clerk of the Court using the CM/ECF System which will send notification of such filing to Douglas E. McKinley, Jr., Peter J. Glantz and Sean A. Moynihan. I hereby certify that I have served the foregoing to the following non-CM/ECF participants by other means: Bonnie Gordon, Jonathan Gordon, James S. Gordon, III and Robert Prichett. I hereby certify that I have served the foregoing to the following persons who are non-CM/ECF participants named in this lawsuit, but who have not yet been served or entered an appearance in this lawsuit by other means: Emily Abbey and Jamila

Gordon.

S/ FLOYD E. IVEY
FLOYD E. IVEY

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